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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA, *Petitioner,*

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE, *Respondents*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
THE QUESTION PRESENTED	3
STATEMENT OF THE EVIDENCE	3
ARGUMENT AND AUTHORITIES	9
I. CALIFORNIA STATUTES AND CASE LAW HAVE BEEN CORRECTLY APPLIED AND ARE NOT IN CONFLICT WITH THE CONSTITUTION, LAWS OF THE UNITED STATES OR DECISIONS OF THIS COURT	9
(A) Applicable Statutory Law and Case Law Should Be Considered in an Analysis of the Issue of Extent of Permanent Disability	10
(B) A Determination of the Extent of Permanent Disability Rests on Many Factors, Only One of Which Is the Intensity or Degree of Pain. Petitioner's Complaint of Headaches as Being Severe Does Not Compel the Commission to Apply Automatically the Schedule Rating of 60% for Severe Headaches or 100% for Pronounced Headaches	13
(C) The Prevailing Rule in California Is That the Commission May Weigh Testimony of Medical Witnesses Against Testimony of the Employee Regarding Existence and Degree (Intensity) of Pain. Therefore, This Case Does Not Involve the Weighing of "Facts Against Guesses"	16
II. RESPONDENT COMMISSION CORRECTLY DETERMINED THAT PETITIONER WAS NOT ENTITLED TO REIMBURSEMENT FOR COSTS OF CERTAIN SELF-PROCURED MEDICAL TREATMENT	21
III. PETITIONER'S NUMEROUS ADDITIONAL CHARGES ARE WITHOUT SUPPORT IN THE RECORD	27
CONCLUSION	30

TABLE OF AUTHORITIES CITED

CASES

	Page
Cadotte v. Ind. Acc. Com., 86 Cal. App. 2d 754	17
Douglas Aircraft, Inc. v. Ind. Acc. Com., 47 Cal. 2d 903	21
Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56	12
Lib. Mut. Ins. Co. v. Ind. Acc. Com. and Serafin, 33 Cal. 2d 89	13
State Emp. Ret. Syst. v. Ind. Acc. Com., 97 Cal. App. 2d 380	20
Sun Indem. Co. v. Ind. Acc. Com. and McKinney, 85 Cal. App. 2d 171	23
Vincent v. Ind. Acc. Com., 136 Cal. App. 2d 679	11
Western Mut. Supply Co. v. Pillsbury, 172 Cal. 407	27

OTHER AUTHORITIES

California Labor Code	
Section 3202	27
Section 4600	22, 25
Section 4601	25
Section 4660	10, 15
Section 5814	8
Section 5953	20
Title 8, Calif. Adminis. Code, Art. 20, Sec. 10926	15
Campbell, Workmen's Compensation, Vol. 1, 340	11
1 Hanna, The Law of Employee Injuries and Workmen's Compensation, p. 86	25
2 Hanna, The Law of Employee Injuries and Workmen's Compensation, p. 260	18

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Respondent Industrial Accident Commission of the State of California respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner, Charles Mannina.

OPINIONS BELOW

On May 14, 1959, respondent California Industrial Accident Commission issued its Decision After Reconsideration, ordering that its Decision After Reconsideration of November 25, 1958, be affirmed and adopted as its Decision After Reconsideration.

The Decision After Reconsideration of November 25, 1958, has been set forth in its entirety in the Petition For Writ of Certiorari at pages 4-6. It awarded permanent disability indemnity, medical treatment and reimbursement for medicolégal expenses while denying reimbursement for self-procured medical treatment.

Petitioner thereupon filed his Petition for Writ of Review in the District Court of Appeal of the State of California which was denied without opinion on September 10, 1959. He then filed a Petition for Hearing by the Supreme Court of the State of California, which was denied without opinion on October 7, 1959.

JURISDICTION

The order of the California Supreme Court denying petitioner's application for a hearing was entered on October 7, 1959. The Petition for Writ of Certiorari was filed on December 10, 1959. The jurisdiction of this court is invoked by petitioner under Title 28, United States Code, Section 1257.

Petitioner asserts that he is being denied equal protection of the law and due process of law guaranteed in Amendment XIV of the Constitution of the United States in that he and 7,000,000 California workmen sustaining "hidden injuries" are given "but token and unenforceable awards" as compared to workers sustaining injuries visible to the eye "who are given the complete protection of the Workmen's Compensation Law * * *" (p. 7).

Respondent commission submits that the District Court of Appeal and the Supreme Court of the State of California correctly applied controlling California statutes and case law which, in turn, are not in conflict with the Constitution, the laws of the United States or decisions of this court. It is submitted that petitioner has not shown any federal question to exist and that the case does not, in fact, present any federal question.

THE QUESTION PRESENTED

Have due process of law and equal protection of law been denied petitioner where respondent commission, after due consideration of all the evidence, awarded him permanent disability compensation of 17 percent ($2,380) of total disability rather than 100 percent, or some percentage in excess of 17 percent?

STATEMENT OF THE EVIDENCE

Petitioner has not set forth sufficient facts from which a realistic perspective of the case may be obtained; further, petitioner has set forth, as facts, numerous statements which are not facts in the record but are merely assertions of petitioner unsupported by any evidence in the record. Therefore it is incumbent upon respondent commission to set forth the essential facts in the case.

Petitioner, a welder, born 1913, sustained an industrial injury on April 19, 1956, when a steel pipe struck him on the head. He returned to work several days later and, except for a few days off subsequently,

continued to work for approximately six months, at which time he left work for less than two weeks. He returned to work for several more months until January 16, 1957.

The First Report of Injury diagnosed the injury as a contusion of the hand and scalp and a concussion. No sutures were required and X-rays of the head and back were negative. At the outset, petitioner's symptoms were described by doctors as "far out of proportion to the severity of the injury" with "no objective neurological signs to account for the symptoms" (Report of James W. Markham, M.D., 5-11-56); "cleared neurologically in regard to any underlying brain damage as to cause of his headaches" (Stanley A. Skillicorn, M.D., 9-21-56); "no neurological disorder resulting from the industrial accident under consideration. Some headache may well be occurring on a tension basis. No reason is seen to attribute any psychoneurosis to the accident under consideration." (John M. Harter, M.D., 10-10-56); "(a) complete neurological reevaluation including the cranial nerves, the motor system, the cerebellar system, the sensory system and the reflexes was entirely normal." (Dr. Skillicorn, 1-14-57.)

On January 23, 1957 petitioner filed an application before the commission and a hearing was held on March 18, 1957. He was represented by counsel. Despite some medical evidence that petitioner was not disabled from work (Dr. Harter, 10-10-56), the referee accepted evidence favorable to petitioner and filed his

Findings and Award on April 10, 1957, providing for continuing temporary disability payments, further medical treatment and reimbursement of $84 for the cost of self-procured treatment by his family physician, Dr. Campisi.

Pursuant to the award the carrier thereafter had petitioner examined by O. W. Jones, Jr., M.D., who reported on April 29, 1957 that neurological examination was normal but that a spinal puncture should be done to rule out the possibility of a subdural hematoma. He stated that no therapy was recommended, that petitioner could carry on his regular, routine work and that he "did not think that this patient should be taking narcotics."

The carrier authorized the spinal puncture, which was performed on May 13, 1957. Dr. Jones reported on May 14, 1957, that the test showed a normal spinal fluid pressure and that the fluid was clear. He reported also that he had given petitioner a prescription for some empirin compound to take in the event of headache. Petitioner agreed to return to work. On the basis of Dr. Jones' reports, the carrier filed a request to terminate temporary disability payments. Petitioner objected and a hearing was held on October 10, 1957.

Petitioner testified, among other things, that he was getting pain pills from Dr. Campisi, that the pills which Drs. Skillicorn and Jones had given him also provided relief but that he did not ask them for more pills because he was getting them from Dr. Campisi.

He had tried on several occasions to work but had had to leave because of his headaches.

Dr. Markham reported on October 31, 1957, in a report to Dr. Campisi, that "(t)here are no objective findings to explain his headaches. In my opinion these are on the basis of chronic anxiety tension state, and he should be physically able to return to the work he was doing at the time of his injury. No further tests seem indicated from the neurological standpoint nor any further treatment."

Dr. Jones reported on July 31, 1957, that neurological findings were normal. He classified the headaches (which petitioner described as coming and going, present maybe two or three times a day) as being of a slight type which petitioner could tolerate but which might cause him some handicap in the performance of his duties. Dr. Jones stated that he should be working, that no further treatment or investigation would be of any value and that while the headaches might persist over a period of two or three years, there should be no permanent disability. On October 2, 1957, Dr. Jones substantially repeated his earlier opinion and petitioner again described his headaches as ones which come and go and which he may have two or three times a day.

On January 10, 1958, the referee issued an award of 8½ percent ($1,155) permanent disability. Petitioner sought reconsideration from the commission which was granted and further hearings were held and evidence taken.

In regard to a psoriasis condition affecting petitioner's scalp, George V. Kulchar, M.D., reported on March 25, 1958, that it is a constitutional disease, frequently hereditary, and while its presence at the site of the trauma may have been caused by the trauma, its occurrence elsewhere was not due to the injury. He stated that "regardless of the injury psoriasis would have appeared on the scalp and elsewhere."

Hearing was held on April 1, 1958, at which Dr. Kulchar testified that a few X-ray treatments would cure the scalp lesions and that any outbreaks involving the scalp were not connected with the industrial injury. William N. Enright, M.D., testified for petitioner to the effect that the injury could have caused the psoriasis. The carrier agreed to institute treatment for the psoriasis and the matter was placed off calendar. On May 20, 1958, Dr. Kulchar stated that petitioner had recovered from the scalp condition so that treatment would be terminated. On July 1, 1958, Dr. Kulchar reported that any reoccurrence and progression of the psoriasis are unrelated to his injury of April 19, 1957.

Hearing was held on July 10, 1958, at which Dr. Kulchar testified that any outbreaks of psoriasis would not be connected with the injury. Petitioner testified, among other things, that he had severe headaches two or three times a day and that he had not worked recently because of them.

The commission requested a recommended rating from its Permanent Disability Rating Bureau on the basis of constant slight to moderate headaches and slight cosmetic defect at the site of injury. The recommended rating was 17% ($2389), an increase of 8% over the prior rating. The 17% rating included 12½% for the headaches and 4½% for the cosmetic defect. Petitioner requested cross-examination of the rating specialist, which was held on October 31, 1958.

Decision After Reconsideration was filed on November 25, 1958 by the commission, awarding permanent disability of 17%, further medical treatment and reimbursement for medical-legal expenses incurred by petitioner. Reimbursement for self-procured treatment by Dr. Campisi was denied.

On December 15, 1958 petitioner substituted present counsel in place of former counsel and filed a Petition for Reconsideration of the November 25, 1958 decision. He charged substantially that which he charges herein.

On February 11, 1959 reconsideration was granted by the commission and the case was restored to the calendar for oral argument on the issues of permanent disability and self-procured medical treatment. Hearing was held on March 23, 1959, at which discussion and oral argument were had. Petitioner raised an additional issue of 10% penalty for unreasonable delay or refusal to furnish medical treatment (California *Labor Code Section 5814*). At the conclusion of oral argument the commission offered to counsel for pet-

given the opportunity to select a medical examiner of his choice to examine petitioner without cost to him. The offer was refused by petitioner's counsel.

Decision After Reconsideration was filed on May 14, 1959, finding that medical treatment had not been unreasonably or wilfully delayed or refused petitioner so as to warrant imposition of a penalty and it was ordered that the Decision After Reconsideration of November 25, 1958 be affirmed and adopted as the Decision After Reconsideration. Petitioner then sought relief in the higher courts.

ARGUMENT AND AUTHORITIES

I. California Statutes and Case Law Have Been Correctly Applied and Are Not in Conflict With the Constitution, Laws of the United States or Decisions of This Court.

Respondent commission submits that there has been no violation of the constitutional requirements of due process of law and equal protection of the laws. As shown by the statement of facts, petitioner was given numerous hearings and was permitted a full and complete opportunity to present his evidence. Both procedurally and substantively, petitioner was accorded due process of law. Controlling California statutes and case law were applied to the case and are applied uniformly to all cases of injury "hidden" or otherwise. Accordingly, petitioner was not deprived of equal protection of the laws. Findings of the commission were ones of fact, made after due consideration of all the evidence, and were based upon substantial

evidence rather than "guesses." Thus there would appear to be no federal question presented by this case.

Petitioner has, however, made sweeping accusations and charges against respondent commission of such a nature that the commission wishes to present sufficient argument to dispel any misapprehensions regarding its handling of the case. As a result, its argument will include some points which were made in the State's appellate courts and which are, perhaps, more appropriate there than in this court.

(A) APPLICABLE STATUTORY LAW AND CASE LAW SHOULD BE CONSIDERED IN AN ANALYSIS OF THE ISSUE OF EXTENT OF PERMANENT DISABILITY.

Petitioner has not informed this court of California statutory law and case law which are applicable to the instant case and which provide the necessary tools by which the problem may be properly analyzed.

California *Labor Code Section 4660* regarding permanent disability states in relevant part:

> "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.
>
> "(b) The commission may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and with

out formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

As stated by the Court in *Vincent v. Ind. Acc. Com.*, 136 Cal. App. 2d 679 at page 684 (1955), in a case remarkably close to the problem in the instant case, "the determination referred to in subsection (a) of Labor Code, section 4660, will of necessity be arbitrary to a degree, and no one can determine with nicety exactly how much an injured employee should receive for the permanent loss, or loss of use, of a particular member of his body. This is illustrated by the provisions of section 4662 which provide that except as to certain enumerated cases, the determination and extent of permanent disability shall be determined by the commission 'in accordance with the fact.'"

The important factors in any permanent disability are impairment of earning capacity and diminished ability to compete in the open labor market. Pain, per se, is not ratable except insofar as it causes impairment of earning capacity and diminished ability to compete in the open labor market. (*Campbell on Workmen's Compensation*, Vol. 1, pp. 340-341, 341).

It is stated in Campbell, Volume 1, at pp. 340-341:

"Pain is subjective. Its degree varies with the individual. Some persons have an unusual obliviousness to pain, while others are hypersensitive. For this reason its evaluation is always difficult and, to a certain extent, conjectural."

"Since compensation is not designed to recompense for mere physical pain and suffering, the fact that such be present is not alone sufficient to warrant disability indemnity. Pain must be present to a degree to be disabling in fact. Usually, where it is present to this degree, there are objective symptoms to substantiate the complaint. . . . If these attendant and corroborative elements be not present, too much weight should not be given to the unsupported statement of the injured as to the existence of pain to a disabling degree. The probity of the injured should be scrutinized. The entire social, moral and mental background should be considered.

"For purposes of permanent disability rating, allowance for pain must be made rather arbitrarily. * * * In the ratings pain alone rarely exists since, if really present, attendant weakness and loss of function also exist."

It is a well-established rule of California law that the extent of permanent disability is a *question of fact* to be determined by the commission. The Supreme Court stated in the case of *Frankfort Gen. Ins. Co. v. Pillsbury*, 173 Cal. 56, at page 59:

"The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. *Its conclusion on this matter is the determination of a question of fact* and is not subject to review by the courts unless palpably

contrary to the undisputed evidence." (Emphasis added.)

In the case of *Lib. Mut. Ins. Co. v. Ind. Acc. Com. and Scrafin*, 33 Cal. 2d 89, the Supreme Court stated at pages 93-94:

> "It is the province of the commission to resolve conflicts in the evidence. * * * Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise by the finder of fact as certainly would occur in the mental processes of a so-called expert witness. When the commission is confronted with widely divergent views as to the extent of the loss of function of the body, further complicated by the possibility of lack of cooperation or faking, in various degrees by the injured person, it may make a determination within the range of the evidence as to the degree of disability. Applicable here is the rule followed in other cases where the trier of fact does not adopt exactly the view of any expert witness as to value. The trier of fact may accept the evidence of any one expert or choose a figure between them based on all of the evidence."

(B) A DETERMINATION OF THE EXTENT OF PERMANENT DISABILITY RESTS ON MANY FACTORS, ONLY ONE OF WHICH IS THE INTENSITY OR DEGREE OF PAIN. PETITIONER'S COMPLAINT OF HEADACHES AS BEING SEVERE DOES NOT COMPEL THE COMMISSION TO APPLY AUTOMATICALLY THE SCHEDULE RATING OF 60% FOR SEVERE HEADACHES OR 100% FOR PRONOUNCED HEADACHES.

Petitioner's argument appears to rest, in part, on the premise that where an employee describes his headaches as severe the commission is bound by the

employee's characterization and must apply thereto the schedule rating of 100%, for pronounced headaches, or at least 60%, for severe headaches.

The weakness of the argument may be seen, first, from the fact that headaches which occur many times a day, lasting for several hours, severe in intensity, are more disabling than headaches which are severe in intensity but occur only once or twice a day, lasting for a more limited time. The former disability would be entitled to a much greater permanent disability rating than the latter.

A second weakness in the argument is in the subjective nature of the complaint of severe headaches. A person may describe his headaches as "severe" who has one every other day, lasting for 30 minutes, severe in degree, while another person having the same problem might characterize his difficulty as mild rather than severe. It would appear to be unrealistic, then, to compel the commission, as the trier of fact, to accept without question the employee's characterization of his difficulty and to apply automatically the schedule rating for severe or pronounced headaches. The intensity of pain may very well be severe but intensity is only one factor in a determination of the extent of permanent disability caused by an industrial injury.

Respondent commission submits that it is *not* compelled to apply the schedule rating of 100%, or 60%, to this case. The schedule is based upon numerous factors. Such factors include frequency of headaches, their duration, the degree (intensity) of pain, the type

of activity bringing on the headaches, the extent of interference with work, the kind of work which can be performed, the presence of any accompanying symptoms such as fatigue or impairment of concentration, the effect of medication in controlling the headaches, ability to compete in the open labor market, and other such factors.

These factors must be taken into account in a determination of whether the permanent disability produced by the headaches is minimal, slight, severe or pronounced. The schedule rating is prima facie evidence of the percentage of permanent disability to be attributed to the industrial injury. (*Labor Code, Section 4660(b).*) However, characterization of the headaches to which a schedule rating is applied is, in the instant case, in the discretion of the commission to be determined from the facts of the case. A rating is then requested from the Permanent Disability Rating Bureau to be made on the basis of the instructions of the trial referee or the commission panel. The resulting rating is a *recommended* rating only. (*Title 8, Calif. Adminis. Code, Art. 20, Sec. 10926.*)

In the instant case the commission determined from the facts that the character of the headaches for purposes of rating the permanent disability was *slight to moderate*. The schedule rating is 5% for the former category and 15% for the latter. The recommended rating for the headaches was 12% after adjustment (for age and occupation) of the selected standard rating of 10%. The complaint of the employee that the

headaches were severe could not require a rating of 100%, for pronounced headaches or 60%, for severe headaches.

(C) THE PREVAILING RULE IN CALIFORNIA IS THAT THE COMMISSION MAY WEIGH TESTIMONY OF MEDICAL WITNESSES AGAINST TESTIMONY OF THE EMPLOYEE REGARDING EXISTENCE AND DEGREE (INTENSITY) OF PAIN. THEREFORE, THIS CASE DOES NOT INVOLVE THE WEIGHING OF "FACTS AGAINST GUESSES".

Even if the commission were to assume for the sake of argument that the employee's characterization of his headaches as severe requires application of the schedule rating for severe or pronounced headaches, the question would still remain of whether the commission *must* accept the employee's characterization of his pain over that of expert medical witnesses. According to petitioner, the opinions of the latter on the subject are mere guesses and cannot produce a conflict with the employee's testimony concerning the severity of his pain.

Respondent commission submits that case law specifically establishes the sound rule of law that the commission is entitled to weigh the testimony of medical witnesses against that of the employee as to *pain* and as to disability, and that the commission is correctly permitted to accept the testimony of the medical witnesses over that of the employee if it so chooses after due consideration.

Said rule of law is set forth in the very case cited by petitioner on the subject of expert testimony versus the injured employee's testimony as to pain and dis-

ability, and it was counsel for petitioner who represented the employee in that case. The case is *Cadotte v. Ind. Acc. Com.*, 86 Cal. App. 2d 754, in which the employee was *unsuccessful* in his attempt to annul the commission's decision. It is true that the court stated that the commission cannot refuse to consider the testimony of the employee as to pain and disability. However, the court also stated at page 758 the rule upon which the case turned, and it is that rule which would appear to control in the instant case:

> "We cannot say as a matter of law that the commission must accept the testimony of petitioner as to pain and disability as against that of a medical man, or vice versa. The testimony of each must be considered by the commission and the conflict must be resolved by it. When that is done, this court may not interfere."

In the *Cadotte* case the commission had denied the employee *any* award of compensation for permanent disability. The petitioner had sustained an industrial injury to his foot and ankle for which he received medical treatment, including an operation. The employee claimed permanent disability consisting of a weak and painful ankle as well as injury to the sole of his foot. The court stated at pp. 757-8:

> "Petitioner contends that he was deprived of due process of law because the commission refused to weigh or consider his own testimony as to pain and disability, and, in fact, completely disregarded it. There is nothing in the record to support this contention."

At page 759 the court, in what constitutes a direct answer to petitioner's position herein, stated that "petitioner's contention is that a petitioner's testimony as to subjective symptoms must be accepted as against contrary medical opinion. Such, of course, is not the law. It is for the commission to decide where there is a conflict, which to believe."

Further authority for respondent commission's assertion that it may adopt the opinions of medical experts concerning subjective complaints over the testimony of the injured employee is found in 2 *Hanna, The Law of Employee Injuries and Workmen's Compensation*, p. 260, wherein it is stated:

> "The principal complaint in almost every type of subjective condition is that of pain or discomfort in varying degrees and locations. Determination of the existence and extent of factors of discomfort is one of the most difficult of a referee's responsibilities, since his judgment as to the presence or absence of exaggeration, conscious or unconscious, may make a difference of many percent and thousands of dollars to the parties, when translated into terms of disability rating factors upon which permanent disability indemnity will ultimately be paid. *The Commission is not bound, however, to accept the employee's testimony as to subjective symptoms as against contrary medical opinion.*" (Emphasis added.)

Respondent commission submits then that there is substantial evidence to support the finding of permanent disability as to the headaches. The evidence shows that the employee sustained an industrial injury on

April 19, 1956, which caused a contusion of the scalp and a concussion. No sutures were required and the injury was such that the employee was able to return to work several days thereafter. Then, except for a few more days off subsequently, he continued to work for approximately six months. He was then off work for less than two weeks and returned to work for several more months until January of the following year. For long intervals after the injury the employee was completely free of the headaches. (Report of Dr. Skillicorn, dated September 21, 1956.) No doctors found any objective evidence of disability and all diagnostic tests, including x-rays, electro-encephalogram, and spinal puncture have been negative. Likewise, numerous evaluations and re-evaluations by medical experts of the cranial nerves, the motor system, the cerebellar system, the sensory system and the reflexes have been normal. The doctors could find no basis to support the subjective complaint of headaches. One doctor, Harter, put them on a tension basis but did not attribute the tension to the instant injury. He stated that there was no traumatic neurosis as a result of the injury and that he saw no reason to attribute any psychoneurosis to the injury.

The doctors have stated that the employee can do his regular work and that he has no permanent disability as the result of his injury. (Report of Dr. Jones dated October 2, 1957, p. 2, and report of Dr. Markham dated October 31, 1957). Dr. Jones describes the headaches as being of a slight type which might

cause some handicap in the performance of his duties. Said reports are the most recent in the record on the complaint of headaches. Despite the strong evidence in the medical reports of no permanent disability as the result of the industrial injury, the commission chose to believe that the injury had caused headaches of a slight to moderate degree insofar as permanent disability from work was concerned. The evidence might have supported a denial of any permanent disability. In any event, the commission determined the extent of permanent disability on the basis of all the evidence. It also awarded compensation to the employee for all time lost from work between the date of injury and October 2, 1957, at which time the disability became permanent and stationary.

California *Labor Code Section 5953* states, in relevant part:

> "The findings and conclusions of the commission on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

The California court, in the case of *State Employees' Retirement System* v. *Ind. Acc. Com.*, 97 Cal. App. 2d 380, 382, stated:

> "In reviewing the evidence we are not permitted to substitute our views for those of the commission and annual an award unless there is no substantial evidence to support the findings and order. (Citation) On the contrary, we are required to indulge all reasonable inferences which may be drawn

legitimately from the facts in order to support the findings of the commission, and in doing so all that is required is reasonable probability; not absolute certainty. (Citations) It is the duty of a reviewing court to search the record to discover whether the evidence is reasonably susceptible of the inferences drawn by the commission in support of its conclusion, and upon favorable discovery to affirm the award. (Citation.)"

In *Douglas Aircraft, Inc.* v. *Ind. Acc. Com.*, 47 Cal. 2d 903, 905, the California Supreme Court stated:

"When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

"The findings of the Commission are not subject to review on this ground except insofar as they may have been made without any evidence whatever in their support."

II. Respondent Commission Correctly Determined That Petitioner Was Not Entitled to Reimbursement for Costs of Certain Self-procured Medical Treatment.

It is difficult to discern from the petition if petitioner is raising a federal question regarding refusal of the respondent commission to order reimbursement for costs of self-procured medical treatment. However, respondent commission believes that its position should be made known to this court again to counteract any

misapprehension which might be derived from petitioner's sweeping attack.

Pursuant to the April 10, 1957 award of further treatment, the insurance carrier reimbursed petitioner for his costs of treatment, assumed medical control and had him examined by Dr. Jones. It was at Dr. Jones' request that the carrier furnished the spinal puncture. The test was negative and Dr. Jones prescribed empirin compound for the headaches, the cost of which was paid by the carrier. Dr. Jones knew of no therapy or investigation that would be of any value. He stated that petitioner should not have narcotics.

A report to Dr. Campisi by Dr. Markham also stated that no tests or treatment were indicated and that petitioner could return to the work he was doing at the time of his injury.

The evidence indicates that petitioner then, without advising the employer or carrier, went on his own to a doctor (Campisi), other than the one furnished by the carrier, thus depriving the carrier of its right to medical control. California *Labor Code Section 4600* provides that medical, surgical, and hospital treatment "reasonably required" shall be provided by the employer. It provides further that "In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

Respondent Commission submits that the employer did not "neglect or refuse seasonably" to provide

treatment "reasonably required" by the injury. The employee admitted at the hearing on October 10, 1957 that the pills prescribed by Dr. Campisi gave temporary relief only, that the pills given to him by Drs. Jones and Skillicorn also gave him temporary relief and that the reason he did not ask them for more pills was because he was getting them from Dr. Campisi. The referee stated, significantly, that the defendants were providing observation and were willing to supply the employee with palliative treatment, but that the employee went to Dr. Campisi on his own and secured palliative treatment which was no more effective than that of defendants' doctors and resulted in no overall improvement of his condition. The referee felt that under the circumstances there had been no neglect or refusal to provide necessary treatment and that, therefore, the self-procured treatment should not be paid by the defendants. (Report of Referee, January 10, 1958). That award was ultimately set aside by the commission when it doubled the permanent disability rating and ordered future medical treatment furnished where the referee had denied further treatment. However the commission denied reimbursement for the self-procured treatment.

The following statement of the court in *San Indem. Co.* v. *Ind. Acc. Com. & McKinney*, 85 Cal. App. 2d 171 at pp. 178-9, is appropriate:

> "It is apparent also that her main reason, expressed more than once, for seeing another doctor, was that she did not feel that the insurance company's doctors were helping her. The situation here

did not justify her going to a doctor of her own choosing without further either contacting Dr. Dresel's office or the carrier and requesting that another doctor be provided. If she was dissatisfied, as the evidence discloses she was, she was not entitled to employ a doctor until she had first given the employer or his carrier the opportunity of providing further care."

The court in the *McKinney* case also quoted with approval, at page 180, from a leading text as follows:

"Schneider on Workmen's Compensation Law, volume 11, 2d edition, section 491, page 1626, states: 'When the employee abandons the medical and hospital service supplied by the employer, and secures other treatment of his own choice, he does so at his own risk, and cannot have the expense of the service of his own choice allowed against the employer or insurer unless he can satisfy the commission that the service supplied by the employer was inadequate or inefficient to an extent that justified the employee in abandoning it.'"

It should be noted that petitioner did not produce any report by Dr. Campisi concerning the nature of the treatment the doctor rendered, what the treatment was for, what the diagnosis is, the prognosis, or anything from which new light might be shed on the medical aspect of the case. Petitioner testified that the injections given by Dr. Campisi were to increase the blood circulation. Without a report or testimony by the doctor, the reason for the injections and their connection, if any, with the injury are unknown. Dr. Campisi is the employee's family doctor and might be

treating him for conditions unconnected with the injury.

Moreover, *Labor Code Section 4601* provides for a change of physicians if the employee so requests. Under that section the employer must offer to the employee a panel of at least three additional practicing physicians competent to treat the particular case. There is no evidence of the employee's having requested a change of doctors in the instant case.

Petitioner has been awarded further treatment and under workmen's compensation law the employer is entitled to direct that treatment. *(Labor Code Section 4600)* If the employee is dissatisfied with the doctors furnished by the carrier, he can request a change of doctors. *(Labor Code Section 4601)* If he still is dissatisfied with the treatment ordered, he can get treatment on his own and produce evidence that the self-procured treatment was different than that furnished by the defendants and that it was reasonably required by the injury. *(Labor Code Section 4600)* Petitioner chose not to produce *any* evidence other than his own testimony. The commission offered to have the employee examined by an independent medical examiner at the commission's expense. Petitioner refused substantially on the grounds that an independent medical examiner would be "insurance minded" and that, in any event, there is no room for medical evidence. According to petitioner the case was simply one in which he is entitled to a permanent disability rating of 100%, and lifetime treatment by doctors chosen by himself.

such benefits being warranted on the basis of his testimony that he has severe headaches and that his own doctor is treating him.

Respondent commission points out that petitioner is not prevented by California law from doing just what he is doing—directing his own medical treatment *at his own expense*. If he wishes such expenses to be the responsibility of the employer, he should secure, from the Legislature, a change in the workmen's compensation laws. Until such legislative change occurs or until petitioner can show that the employer has neglected or refused seasonably to provide treatment reasonably required by the injury, reimbursement should be denied. The evidence in the record does not, at this time, compel or warrant a contrary finding.

In connection with petitioner's argument that the defendants agreed to pay certain costs of self-procured treatment, the Referee's Report of the hearing on October 10, 1957 states that the defendants agreed to pay the employee's *accrued* drug bills. Said bills were paid and there is nothing to show an agreement to pay any other bills.

Petitioner's reference at page 11 of his petition to the need for an operation to insert a silver plate in his skull is a reference to medical evidence obtained by him and submitted to the commission only recently and well after the instant decision under attack was rendered. Said evidence is part of a new proceeding instituted by petitioner before the commission, w[illegible]s pending at this time.

III. Petitioner's Numerous Additional Charges Are Without Support in the Record.

Petitioner makes many additional charges and accusations. Respondent commission submits that an examination of the facts, together with application of relevant statutes and case law to those facts, indicates that the charges are without support. His contention that the commission regards itself as not being a court and, therefore, not governed by the mandate of liberal construction contained in *Labor Code Section 3202** is unsupported by any evidence whatever. It is a bare allegation without more. The commission has the status of a court (*Western Mut. Supply Co.* v. *Pillsbury*, 172 Cal. 407; *1 Hanna, The Law of Employee Injuries and Workmen's Compensation*, p. 86) and is bound by the rule of liberal construction.

Petitioner's contention that respondent commission is denying complete protection of the workmen's compensation laws and the Constitution to workers suffering "hidden injuries" while affording complete protection thereunder to workers suffering "visible injuries" is unsupported by the evidence in the particular case and is not borne out by past cases. Respondent commission considers each case on its merits, receiving into the record all relevant, material and competent evidence upon which, as the trier of the facts, it makes its findings. Whether the injury in question is external

* "The provisions of Division 4 and Division 5 of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

or internal, visible or invisible, hidden or otherwise, the question for resolution is still one of fact where the evidence is in dispute. A physician's medical opinion regarding the intensity of pain suffered by a claimant is as much a reliable fact to be weighed in the determination as is the claimant's estimate of it. The expert's opinion is based upon objective and subjective findings which, in turn, are evaluated by the physician on the basis of his knowledge of medicine and his experience and observations in previous cases of a similar nature. Application of the expert's knowledge, experience and skill to the problem at hand (intensity of pain) would appear to provide as sound a basis for decision as the testimony of the claimant."

If the California appellate courts and respondent California commission are correct in their position that the question is one properly within the realm of expert evidence as well as lay evidence, petitioner's assertions regarding "guesses" would seem to be without merit. Further, respondent commission applies this rule to *all* injuries, not just to "hidden injuries." To deny the competency of an expert's testimony is to assert that the commission is bound to accept a claimant's characterization of his pain, except insofar as his credibility may be questioned. Under petitioner's view, results of scientific inquiry would be incompetent and would raise no conflict. Respondent commission submits that such an approach does not afford a sound and realistic basis for solution of the problem. The preferable approach is to receive both lay and expert

evidence applicable to the problem, to weigh that evidence in its entirety and to resolve any conflict therein. The conclusion or inference thus drawn has a fair and substantial basis.

The validity of the many catch phrases used by petitioner, such as "guesswork justice", "ONE PER CENT RULE", "AMEN RULE", "triers of the guesses", "witchcraft justice" and others must be determined by analysis of the facts and application thereto of controlling statutory law and case law. Respondent commission submits that said phrases, upon analysis, have no application to the instant case or to other cases before the commission.

CONCLUSION

Respondent commission submits that there has been no violation of the constitutional requirements of due process or equal protection of the laws. Petitioner was given numerous hearings and full opportunity to present his evidence. Both procedural and substantive due process of law were accorded to him. Controlling state statutes and case law were correctly applied and are of uniform application. Findings of fact were made after due consideration of all the evidence and were based on substantial evidence as required by state statutes. The appellate courts therefore did not disturb the findings.

Respondent commission submits that, for the reasons set out above, the Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California, December 31, 1959.

Respectfully submitted,

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